

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 17 March 2014

Public Authority: Ashington Town Council
Address: Town Hall
65 Station Road
Northumberland
NE63 8RX

Decision (including any steps ordered)

1. The complainant has requested details about allotments and allotment associations held by the council. The council provided information in respect of allotments land which it managed itself but refused the request for information relating to other sites saying that it was not held. The information was held by the allotment associations itself and was available from them. It subsequently agreed with the Commissioner that the information was held on behalf of the council. The council also applied Regulation 12(4)(b) to some of the requested information on the basis that it had provided this to the complainants solicitors previously.
2. The Commissioner's decision is that the council was not correct to rely upon Regulation 12(4)(b), and that the information was held on behalf of the council by the allotment associations. He has also decided that the council did not provide the information within the time deadline required by Regulation 5(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To reconsider the request and respond to the complainant as required by Regulation 5, without relying upon the exception in Regulation 12(4)(b).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. Following a previous dispute between the parties, on 26 June 2013 the complainant made the following request for information under the FOIA for:

"I also formally request, as per the Freedom of information a copy of:-

- a) The names and location of allotment sights owned by ATC*
- b) The number of plots on each sight*
- c) The number occupied of plots on each sight*
- d) The number of vacant plots on each sight*
- e) A signed agreement, between ATC and your site management agents,*
- f) A copy of the ATC rules, along with any local added rules enforce on each site*
- g) The names and addresses of the committee officials, this is also as per my rights under the allotments act*
- h) A copy of the rent books for each site, this is also as per my rights under the allotments act."*

6. The council responded on 26 September 2013. It provided information which the complainant agreed responded to points a) and g) from the questions above.
7. Following an internal review the council wrote to the complainant on 7 November 2013. It provided further information to the complainant however he considered that further information is held by the council which should have been disclosed in response to his request.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. He complained that the council had not provided him with the information and had ignored his requests until the Commissioner had written to it.
10. The complainant also complained that the council had written to his solicitors after he had already told them that they were no longer

representing him, thereby incurring a further invoice which required payment. This complaint is not however a matter for the Commissioner in respect of this decision notice.

11. The Commissioner considers that the complainant's complaint is that the information has not been provided to him and that the council's response to his requests was not within the time limits required by the Regulations.

Reasons for decision

Is the information held on behalf of the council?

12. The council told the complainant that the withheld information is not held by the council as the sites are managed under a devolved management agreement by the management associations. It therefore provided the complainant with contact details for each allotment association and told him to contact them to obtain the information he wishes.
13. The first question which the Commissioner must therefore consider is whether the information is held by the allotment associations on behalf of the council. If it is not the information is 'not held' for the purposes of the Regulations. The fact that the council would be able to obtain that information from the allotment associations is of no consequence unless that information is in fact held on the council's behalf.
14. The council initially argued that its statutory duty is to ensure that there are enough allotments available for people who want them. It must obtain or make land available for allotments when certain criteria are met. The council argued that its statutory duties extend to no more than this.
15. The council leases land to allotment associations on a devolved management basis, allowing the associations to sign a lease which ties it to carry out the management of the allotment land, manage waiting lists and keep the allotments in good order. The Commissioner does not question that the council is therefore correct when it says that the information is physically held by the allotment associations rather than by the council itself.
16. The council holds the right to inspect information held by the associations.
17. Section 3 of the agreements which the council signs with allotment associations says:

"It has been agreed between the parties hereto that the allotment areas shall be controlled and managed by the Allotment Association as agents for the Council on the terms and conditions hereinafter mentioned."

The Commissioner notes that the allotment associations are therefore agents of the council when managing the allotments.

18. During the course of the Commissioner's investigation the council did reconsider its position and accepted that the information is held by the allotment associations on behalf of the council.
19. As the information is held on behalf of the council by the allotment associations the council holds that information for the purposes of the Regulations.
20. The next question is whether the council is entitled to say to the complainant that he must request the information directly from the allotment associations rather than the council itself responding to the request.

Is the information available by other means?

21. The council has not refused the request as such, it has said that that information is available to him, but required the complainant to obtain it directly from the allotment associations themselves.
22. The question for the Commissioner is therefore whether the council is under a duty to respond directly to the complainant providing the information or whether it is entitled to say that the information is available however the complainant must approach the allotment associations directly to obtain it.
23. Regulation 6 states that

"Form and format of information

6. - (1) *Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –*

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format."

24. As regards Regulation 6(1)(b) the Commissioner must consider whether the information held by the management associations is 'publicly available' and 'easily accessible to the complainant' via the allotment associations rather than directly through the council itself.
25. The council has provided the complainant with details of contact points for each of the management associations. It is therefore clear that if he wished to obtain the information from the management associations he has the information which he needs in order to request it.
26. The Commissioner notes that the complainant is not able to access the information he wishes other than requesting it from the management associations. He has seen no evidence that it is made available at libraries or on the internet. It is therefore difficult say that the council has taken steps to disseminate the information more widely although the council argues that it would be available from the allotment associations upon request.
27. As the complainant wishes the information from a number of associations he would need to ask each one individually to provide him with the information he wishes. The council itself does hold the information for the purposes of the Regulations and the Commissioner considers that it is therefore reasonable for him to request that information from it rather than making a number of individual requests. The Commissioner does not therefore consider that the Regulation 6(1)(a) is applicable.
28. The complainant has pointed out that the management associations are not themselves subject to the provisions of the FOI Act or the Regulations, and so could in theory refuse to accept that the requests are valid and not respond to them. They are under no duty to respond albeit that in all likelihood they would do. The council has for its part indicated that the allotment associations are asked to work to data protection principles and to provide general information regarding vacancies, rent levels etc on request. It said that all allotment associations do this.
29. The Commissioner has considered whether the information is therefore publicly available. He notes that if he were to make a decision that the information is publicly available from the allotment associations, the allotment associations could subsequently refuse the request. This would leave the complainant in a position where he was not able to obtain the information he has asked for without reverting to the council. This cannot be correct.
30. The information is in effect only publicly available if each management association agrees to provide it to the complainant. The Commissioner

recognises that in all likelihood the information would be provided if the complainant asked for it, but as the allotment associations are not public authorities themselves he cannot require them to do so and there is no definite assurance that that would be the case.

31. The Commissioner's decision is therefore that the information is not 'publicly available' for the purposes of the Regulations. The allotment associations act on behalf of the council, and in the case where information on all of the allotment associations is requested the council would be the body which could reasonably be expected to obtain the information from the allotment associations, collate it and provide it to requestors upon request.
32. Additionally the number of individual requests which the complainant would need to make in order to obtain the information in the manner he wishes would not be it is not 'easily accessible' for the purposes of Regulation 6(1)(b). Regulation 6(1)(b) is not therefore applicable in this instance.
33. The Commissioner is therefore satisfied that the council is not able to refuse the request on the basis that it is publicly available from the allotment associations. He does understand the arguments of the council in this respect, however given that the complainant has requested information on all of the associations it seems reasonable to expect it to respond to the request itself rather than approach each association separately.

Regulation 12(4)(b)

34. The council has said that it provided some of the information to the complainant's solicitor previously. It has therefore applied Regulation 12(4)(b) to the information. This provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
35. It said "*the council previously supplied full and identical information to that contained in items e, f and g of [the complainant's] most recent request. That full information was supplied to [the complainant's] solicitor at his own request, over a prolonged period between November 2011 to August 2012, and was then fully referred to in detail and at length by [the complainant] himself in a personal representation to the town council in support of his complaint and dispute with the allotment association.*"
36. The Commissioner therefore notes that the last information was sent to the complainant's solicitor, at the latest point, in August 2012. The complainant's request for information was made on 26 June 2013, ten

months later. Although the information is unlikely to have changed greatly over that period it is nevertheless possible that the information will have been updated to include information which is new or different to that provided previously. Certainly the rent books would be likely to have changed to incorporate any new payments, and it is also possible that waiting lists and the lists of vacant allotments might have changed to a degree.

37. The Commissioner is therefore satisfied that it is reasonable in this instance for the complainant to make a further request, given the period of time which had passed since the information was previously disclosed to his solicitors.
38. The council did not provide strong arguments to suggest that the complainant's request was vexatious. It did say that this request followed a long running dispute and that the central issues behind that had previously been considered by the town council. Whilst the council may consider that the requests were vexatious in nature and seeking to reopen or continue his dispute with the council it did not provide substantial arguments to the Commissioner to this effect.
39. The basis of the council's claim to Regulation 12(4)(b) in this instance appears to be that the request is for information which has previously been disclosed, and that it is also available to the complainant to obtain the information from the allotment associations directly. In effect it is saying that to obtain and provide the information again would place a disproportionate burden on the council given
 - The council's size,
 - the previous disclosure,
 - the fact that the complainant's dispute has already been considered by the council previously and
 - the fact that the information is available directly from the allotment associations.
40. The council is a small public authority and only has a very small number of employees working for it. It argues that expecting it to respond would create a disproportionate burden upon the council to collate and disclose this information again, bearing in mind the complainant's other options to obtain the information. It also argues that its system of referring requestors to the allotment associations for information has worked well previously, and that the complainant is the only person it has ever received a complaint from over this issue.

41. The Commissioner considers that the complainant's request is however also about ease of access. Rather than having to write to a number of allotment associations and collate that information himself he has identified the council as the public authority in control of the allotments overall, and it is therefore reasonable for him to go directly to the council for information on all of the allotment associations.
42. The Commissioner has also outlined his view that a sufficient amount of time has passed since the previous disclosure and that the information which is held by the allotment associations may have changed or been added to during that period.
43. The Commissioner's decision is therefore that the council was not correct to apply Regulation 12(4)(b) to this request.

Regulation 5(2)

44. Regulation 5(2) provides that "*Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.*"
45. The complainant made his request for information on 26 June 2013. The council responded to the request on 26 September 2013 after receiving a letter from the Commissioner reminding it of its obligation to respond to requests within 20 working days.
46. The council indicated that it had recently moved offices from working within another council's offices. It said that the request had been received at the other council offices but had not been forwarded on to it until shortly before it had responded to the complainant.
47. It says that the recorded delivery slip was signed with a name that it does not recognise as being an employee of that council and it does not know why the request was not initially forwarded to it.
48. Nevertheless the request was responded to outside of the 20 working days required by Regulation 5(2). The Commissioner's decision is therefore the council did not comply with the requirements of Regulation 5(2).

Conclusions

49. The Commissioner notes that some of the information requested by the complainant may in fact be exempt under other exceptions. For instance rent books may contain personal data of allotment users rather than simply information on the individual allotment association's payments to the council. Information which identified individual allotment owners may be exempt under Regulation 13.

50. The Commissioner has not therefore ordered that the information is disclosed as a step within this decision notice. He has decided that the exceptions which the council has applied were not correctly applied and so his decision is that the council should reconsider its decision on the information, without reliance upon the exceptions previously applied, and issue a new response to the complainant as required by Regulation 5.
51. In considering the information to be disclosed the council should have regard the rights of any third party individuals whose information is held within the information where a disclosure of that information would fall within the scope of Regulation 13 and would be likely to breach the data protection principles of the Data Protection Act 1998.
52. Should the complainant consider that information is withheld incorrectly under the councils new response he is able to make a further complaint to the Commissioner.

Other Matters

53. The complainant also complained to the Commissioner that the council had stated to him that to provide the information which it had previously provided to the complainant's solicitors would require a charge of 25 per hour. It did not however seek to charge him for that information as it ultimately refused the request.
54. The Commissioner highlighted to the council that the charge which it indicated it would make to the complainant was not in accordance with the Regulations.
55. It is for a public authority to satisfy itself that any charges made under the EIR do not exceed a reasonable amount (a subjective test) but in reaching its decision it must only take into account relevant considerations (for example, the actual cost of photocopying) and must disregard any irrelevant ones (for example, the impact of charges on the revenue of the public authority). In any event, the charges should not exceed the cost of providing the information.
56. If a public authority attempts to charge an unreasonable fee, the Commissioner will find that an authority has breached Regulation 8(3).
57. In order to levy a charge, a public authority must notify the applicant no later than 20 working days after the date of receipt of the request. Failure to do so will lead to a breach of Regulation 8(4).

58. The council, for its part has said that it has not as yet charged or sought to charge the complainant any money for responding to his request. It said that it had merely informed the complainant that if he persisted with his request for information which had already been disclosed to him then then it would require a fee for that information, and indicated the amount which it would consider chargeable under the circumstances.
59. The Commissioner has outlined to the council that the fee indicated would not comply with the requirements of the Regulations.

Right of Appeal

60. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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